BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:October 28, 1997
Case No: 96-INA-00193

In the Matter of:

L.A. CENTURY TEXTILES, INC.
Employer

On Behalf of:

TERESITA M.SALDE
Alien

Appearance: Wade J. Chernick, Esq.
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Teresita M. Salde ("Alien") filed by Employer L.A.Century Textiles, Inc.. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment

service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On January 5, 1995, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Accountant in its Textiles Wholesaler company.

The duties of the job offered were described as follows:

Prepares financial statements and accounting reports for submission to management. Ascertains the proper amounts of the company’s assets (accounts receivables, inventory, fixed assets and cash) and liabilities. Updates and advises management on accounting/tax ramifications. Renders budgetary cash flow and inventory control projections. Reports to management concerning the scope of all audits including receivables and inventory discrepancies. Enters all findings onto computer by using DAC-EASY, FRAME WORK III and XENIX SYSTEM for subsequent review by management.

A B.S in Business Administration with major field of accounting and 2 years experience in the job were required. Special requirements were: 1. Prior experience in cash flow and budgetary projections. 2. Inventory control experience 3. Internal auditing 4. Knowledge of DAC-EASY computerized accounting system 5. Financial statement analysis. Wages were $32,000.00 per year. The applicant would supervise 0 employees and report to the C.E.O. (AF-42-227) 33 applicants applied.

On March 7, 1995, the CO issued a NOF denying certification. The CO found that Employer may have violated 20 C.F.R. 656.21(b)(5) in that the requirement of two years experience with FRAMEWORK II and XENIX did not appear to meet the minimum requirements for the job since alien did not appear to have this experience when she was hired. Corrective action was demonstration that alien previously had the experience or that it is infeasible to train U.S. workers.

The CO also found that employer may have violated 20 C.F.R. 656.21(b)(6)in that U.S. applicants were rejected for unlawful reasons. Specifically, “..it appears U.S. workers DUKHOVNY, GARCIA, WYLES, CONDE, LEE, LEGGIERO, PHAM, ROWATT, SORIANO, WU, TREMILLO, TOMISTA, and SABOGAL were rejected for other than valid job-related reasons--see requirement found restrictive in section I. LAM, LEGGIERO, ROWATT, and SORIANO report you never in fact set up interviews for them: SABOGAL reports you never contacted her; and WYLES and CONDE found your interviews to be an attempt

to deter their interest. Similarly, Employer was found by the CO to have rejected the other 16 applicants unlawfully, since they were not interviewed even though they appeared to have the combination of education, training and/or experience to perform the usual requirements of the job. Corrective action was to document with specificity why each U.S. worker is being rejected for job related reasons. Additionally, the CO stated that resumes from the Job Service Office were not responded by Employer to until 26 to 43 days after being sent out, evidencing a lack of good faith recruitment effort. (AF-36-40)

Employer, May 26, 1995, forwarded its rebuttal, stating that Employer never required the U.S. workers to have experience with FRAMEWORK II and XENIX accounting software, but merely two years accounting experience. Employer contended 16 applicants did not have the requisite experience based on their resumes. Employer then listed seven applicants that were interviewed according to Employer, and for one reason or another found wanting. “Finally regarding your last point, I acknowledge that resumes were sent on a tardy basis. However, all applicants who were, in fact, interested in the position were notified by certified mail and, either, contacted this company for an interview, or were followed up with a phone call and were later interviewed for the position. As such, even though applicants may have been notified in an untimely basis, nobody was prejudiced by the fact that interviews were held.” (AF-20-30)

July 27, 1995, the CO issued a Final Determination, denying labor certification. Summarized, the CO found that six applicants were not addressed by Employer, thus acknowledging that they were qualified. Six applicants were not furnished further documentation as required by the CO as to their qualifications which seemed to be sufficient for the job opportunity. Finally, the CO stated:”We don’t understand how you can conclude that a four to six week delay in your contact effort caused no “prejudice” against the applicants when the BALCA has held again and again that such delays in contact and interview are prejudicial to applicants’ interest in the job offer.” (AF-18-19)

Employer appealed, August 31, 1995 (AF-1-17)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit

qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988).

We believe the CO was correct in denying certification on the basis that employer had not directly rebutted the CO's allegation that six applicants were qualified and not interviewed. Since Employer has not rebutted this finding, it is deemed admitted and is grounds for denial.

Further, the CO is, also, correct in finding that timely contact was not made with five applicants who appeared qualified for the job offer. An unjustified delay in contacting applicants is presumed to contribute to an applicant's unavailability. Creative Cabinet and Store Fixture , 89-INA-181 (Jan. 24, 1990)(en banc).

Employer has shown a preference for alien as a worker where she presently is employed. However, there is no evidence she obtained the skills required in the job description prior to her current employment.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:
Case No: 95-INA-286

In the Matter of:

M.K. DESIGNERS, INC.
Employer

On Behalf of:

SETRAK MERACHIAN
Alien

Appearance: Baliozian & Associates
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Setrak Marachian ("Alien") filed by Employer M.K.Designers, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On April 15, 1993, the Employer filed an application for labor certification to enable the Alien, a Lebanese national, to fill the position of Wood Machinist in its cabinet and furniture manufacturing and construction company.

The duties of the job offered were described as follows:

> Responsible for set up and operation of woodworking machinery for fabrication of doors, windows, cabinets, and fine furniture. Operate power saws, drills, drill presses, sanders, tenoner, mortising machine, boring machine, router,and hand tools. Prepare parts according to specifications. Follow intricate design specifications for furniture orders.

No educational requirements and two years experience in the

job were required. Wages were $640.00 per week. (AF-25-53)

On June 22, 1994, the CO issued a NOF denying certification, finding that a U.S. applicant, Kenneth R. Pruett was unlawfully rejected. Employer alleged in his undated recruitment results report that applicant Pruett had stated the job site was too far. In a signed questionnaire from Mr. Pruett, he stated that he would not have turned down a job for $16.00 per hour, indeed, that he would have gone to Chicago or New York for that money. He further stated that he received a phone call from a woman who asked him if he could do carvings. She also asked if he could speak Farsi. The woman told him he was not qualified and hung up.(AF-21-23)

Employer, June 29, 1994, forwarded its rebuttal, stating: "As Mr. Pruett stated to you in his questioneer, Mrs. Keuroghlian asked the applicant if he had experience doing wood carving, using the specialized equipment and hand tools as was required in the job description, to construct some of the more intricate detail designs on furniture and cabinets. He responded that he was not able to do carvings. It was based upon this response that he was told that he was probably not qualified. Mr. Pruett also stated to Mrs. Keuroghlian that the job site in Glendale was too far to come for a job." (AF-9-20)

On August 23, 1994, the CO issued a Final Determination denying certification since Mr. Pruett as a master carpenter according to his resume who owned and operated a custom cabinet shop was qualified for the job opportunity. The fact that he cannot do carvings with chisels is not pertinent since the duty was not listed on the ETA 750A form. (AF-6-8)

On September 7, 1994, Employer filed a request for review and reconsideration of Final Determination. (AF-1-5)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988). As a general matter, an employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or the advertisements. Jeffrey Sandler, M.D., 89-INA-316 (Feb.11, 1991)(en banc).

We find the CO was correct in finding that the rejection of Mr. Pruett was unlawful, in that he appeared well qualified for the position and expressed an interest in accepting same. Employer's reason for rejection was that applicant was not familiar with a hand chisel, a duty that was not set out in the job requirement and would not appear to be accurate, given his long and intimate experience in the field. Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Design, 89-INA-118 (Nov. 29, 1990)(en banc).

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge